NO. 216

In the Supreme Court of the United States

OCTOBER TERM, 1941

A. W. STICKLE & COMPANY, a Corporation,
Petitioner,
VERSUS
INTERSTATE COMMERCE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF

JOHN B. DUDLEY,
DUKE DUVALL,
Counsel for Petitioner.

July, 1942.

UTTERBACK LITHOPRINTING CO., OKLAHOMA CITY, OKLA.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petitioner, A. W. Stickle & Company, a corporation, respectfully shows:

A SUMMARY STATEMENT OF THE MATTER INVOLVED

The decisions below were based upon undisputed facts, consisting largely of two stipulations (R. 59, 85). The matter involved is purely one of construction of the Federal Motor Carrier Act of 1935, as amended (Interstate Commerce Act, Part II, Sections 201-227, 49 U. S. C. A. 301-327 (49 Statutes 543, *et seq.*, amended 54 Statutes 919),[1]

1. Referred to herein as the Act.

and particularly the classification of carriers for hire and private carriers under the definitions therein.

Petitioner is a small Oklahoma corporation chartered as a lumber dealer (R. 63), both wholesale and retail, and conducting only a wholesale business. It purchases lumber from the mills in Arkansas and Texas and sells to lumber dealers in several states, the majority of all lumber handled being sold to dealers in Oklahoma at points throughout the State (R. 60).

All transactions conducted by petitioner are in lumber of which petitioner is the owner. In the conduct of its business, petitioner operates ten or twelve trucks for the purpose of transporting lumber which it purchases from the mills to its retail dealer customers. It owns all lumber which it transports (R. 62), and will not haul for anyone else (R. 112).

In the sale price, petitioner includes a charge for transportation commensurate with the expense thereof. So that a dealer located on the western side of Oklahoma, four hundred miles from the mill, would pay a higher price for the same lumber than a dealer situated near the Arkansas line and only one hundred miles from the mill area.

This is a critical fact in the case, because respondent contends it makes the operations those of a carrier for hire.

Petitioner has no certificate or other authority from the Interstate Commerce Commission to conduct such opera-

tions, and contends it is a private carrier in interstate commerce, and under the Act none is required.

Respondent instituted this action in the District Court for the Eastern District of Oklahoma to enjoin petitioner's operations until a certificate of authority had been obtained from the Interstate Commerce Commission to operate as a carrier for hire, upon the ground that such operations were not those of a private carrier and were being conducted in violation of the Act.

DECISIONS BELOW

The trial court granted the injunction (R. 95), and held petitioner to be a *common* carrier for hire (R. 94). The opinion is reported in 41 Fed. Supp. 268.

The Tenth Circuit Court of Appeals affirmed (Judge HUXMAN, dissenting), but held that petitioner was a *contract* carrier for hire, without mentioning the trial court's determination of its operations being those of a common carrier (R. 165). Opinion not yet officially reported.

JURISDICTION

The date of the decision and judgment of the United States Circuit Court of Appeals for the Tenth Circuit sought to be reviewed is May 1, 1942 (R. 165, 177). Petition for rehearing was filed May 29, 1942, and order denying the petition was entered June 5, 1942 (R. 180).

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended (43 Statutes, 938, 28 U. S. C. A. 347).

QUESTIONS PRESENTED

The sole issue is whether petitioner is a private carrier by motor vehicle in interstate commerce, or is a carrier for hire, under the classifications as defined in Section 203 (a) of the Act (49 Statutes 543, as amended 54 Statutes 919, 49 U. S. C. A. 303 (a)).[2]

The questions presented are:

(1) Under the definition of the Act, is not an individual a private carrier where he neither transports nor holds himself out to transport property for the public nor

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2. Section 203 (a) (14), (15), (16), and (17) of the Interstate Commerce Act provide:

"(14) The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to Part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to Part I.

"(15) The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the

for any third person, and hauls only property which he owns and for the purpose of sale, even though the sale price of the property so transported includes a charge for transportation?

(2) Do the provisions of the Act prevent one from being a private carrier in the transportation of his own goods by motor truck, because the sale price of such goods is higher at points more distant from the place of origin than those nearer it on account of the extra transportation expense?

(3) Are not the words "for compensation," as used in the definitions of the classes of carriers in the Act, synonymous with "for hire"?

(4) Would not the Act be unconstitutional in violation of the Due Process Clause of the Fifth Amendment if the definitions of the types of carriers in the Act do not

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exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

"(16) The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

"(17) The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', 'who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent or bailment, or in furtherance of any commercial enterprise.' "

mean that one transporting his own goods for the purpose of sale is a private carrier, notwithstanding the fact that he makes a charge in the sale price commensurate with the distance the goods are transported?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The reasons upon which petitioner relies for the allowance of the writ are as follows:

(1) The Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court. This is a case of first impression, being the first case involving a construction of the definitions of the three types of motor carriers classified in Part II of the Interstate Commerce Act.

(2) The Circuit Court of Appeals has decided a federal question in a way probably in conflict with the applicable decisions of this Court on statutory construction, because it has construed the Act in such a way as to convert a private carrier into a carrier for hire, which would make the Act unconstitutional in that respect as being in violation of the Due Process Clause of the Fifth Amendment to the Constitution.

Michigan Public Utilities Commission v. *Duke* (1925), 266 U. S. 570, 69 L. ed. 445, 45 S. Ct. 191, 36 A. L. R. 1105.

Frost & Frost Trucking Company v. *Railroad Commission* (1926), 271 U. S. 583, 70 L. ed. 1101, 46 S. Ct. 605, 47 A. L. R. 457.

Smith v. *Cahoon* (1921), 283 U. S. 553, 75 L. ed. 1264, 51 S. Ct. 582.

(3) The questions presented are of great public importance because they involve the most vital feature of the Act, namely, the definitions of the classes of carriers to whom the Act applies, and the consequent regulations and provisions of the Act with which a particular individual must comply. Of special importance is the fixing of the line of demarcation between those falling into the classes of carriers for hire, with the stringent regulations justified through their character as public utilities, and those who fall into the class of private carriers, with the privilege of operating as a matter of right and subject only to slight regulations primarily in the interest of public safety. Constitutional rights are concerned, because if the definitions contained in the Act have the effect of converting by legislative fiat the operations of one who is a private carrier into those of a carrier for hire, such would amount to the deprivation of property without due process of law.

(4) The questions involved, determined by the courts below, have wide-spread significance and effect, particularly to dealers in lumber, coal and other bulky, low-value products, for the reason that they will be forced, if the decision below is correct, to abandon transportation of their own goods and compelled to use the services of carriers for hire, or will be driven to the alternative of engaging in the business of a carrier for hire and withdrawing from the business in which they are now engaged.

Wherefore, petitioner respectfully prays that a writ of certiorari may be issued out of and under the Seal of this Honorable Court, directed to the United States Circuit

Court of Appeals for the Tenth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket: No. 2410, A. W. Stickle & Company, a corporation, Appellant, *vs.* Interstate Commerce Commission, Appellee; and that the said judgment of the Circuit Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem mete and just; and your petitioner will ever pray.

JOHN B. DUDLEY,
DUKE DUVALL,
Counsel for Petitioner.

July, 1942.

NO. . . . . .

In the Supreme Court of the United States

OCTOBER TERM, 1941

A. W. STICKLE & COMPANY, a Corporation,
Petitioner,

VERSUS

INTERSTATE COMMERCE COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The district court filed two opinions written by District Judge EUGENE RICE. The first one dealt with the denial of petitioner's motion to dismiss for want of proper service and for want of proper venue. The decision was entered on February 6, 1941, and is reported in 36 Fed. Sup. 782. The Circuit Court affirmed this ruling, and no review is sought here on this feature.

The second opinion of the district court, which is on the merits of the case, is dated September 12, 1941, and reported in 41 Fed. Sup. 268.

The Circuit Court of Appeals filed one opinion (R. 165), written by Judge PHILLIPS, Judge HUXMAN, dissenting. The opinion is not yet published.

JURISDICTION

Petitioner seeks a review by certiorari of the judgment of the United States Circuit Court of Appeals for the Tenth Circuit of March 18, 1942, petition for rehearing denied June 5, 1942, under the provisions of Section 240 (a) of the Judicial Code as amended (28 U. S. C. A. 347 (a)).

STATEMENT OF THE CASE

Although additional facts will be needed by the Court in consideration of the case upon the merits, if jurisdiction is assumed, we believe that for the purposes of this petition the essential facts are stated in the petition, and for the sake of brevity, we will not repeat them here.

SPECIFICATIONS OF ERROR

(1) The Circuit Court of Appeals erred in holding that the operations of petitioner were not those of a private carrier under the Act, where petitioner transported only its own goods "for the purpose of sale," and in furtherance of a "commercial enterprise," even though the sale price of the property transported included a charge for transportation greater at points more distant from orgin than those at nearer points.

(2) The Circuit Court of Appeals erred in not holding the Act to be unconstitutional with respect to the definition of a private carrier as being in violation of the Due Process Clause, under the construction placed by the Court thereon.

SUMMARY OF THE ARGUMENT

Point I.

This is the first case involving the construction of the definitions of the classes of motor carriers classified by the Act, and the Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

Point II.

The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court, because it has construed the Act in such a way as to convert a private carrier into a carrier for hire, which would make the Act unconstitutional in that respect as being in violation of the Due Process Clause.

ARGUMENT

Point I.

This is the first case involving the construction of the definitions of the classes of motor carriers classified by the Act, and the Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

There has not heretofore been presented to this Court nor any other Circuit Court for determination the important matter of the construction of the definitions of the various classes of motor carriers governed by the Act. There can be no doubt that the issues here make this a case of first impression.

The grave importance of the questions involved becomes apparent when one considers the tremendous part played in the national economy by Part I of the Interstate Commerce Act governing railroads. With the development of the motor carrier industry, Part II of the Interstate Commerce Act is now taking a like place.

No single feature of the Act could have greater significance or importance than the classification of the carriers which are subject to the Act, and the resulting determination of which category of regulations will govern a particular carrier.[3]

The decision of the questions in this case will fix the measure for operations of carriers in the determination of whether such are those of a carrier for hire which must have a certificate of convenience and necessity, file tariffs and meet other rigid requirements as a prerequisite to doing

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3. In an enlightening and exhaustive article in the November, 1941, issue, Volume 9, No. 2, page 119 of the I. C. C. Practitioners' Journal, on the subject of "Common, Contract, and Private Motor Carriers Defined and Distinguished," by WARREN H. WAGNER, Editor-in-Chief, it is stated:

"The Motor Carrier Act, 1935, and as amended, divides the motor carriers subject to regulation by the Interstate Commerce Commission into common, contract and private. The regulations of those carriers vary in degree. The most stringent regulations apply to the former, *i. e.*, the common carrier; and the least rigid to the latter, the private motor carrier. Because of that, the question of whether a given motor carrier falls within one or the other class often becomes highly important."

business; or whether the operations come within the private carrier category with the privilege of operating as a matter of right without permission from the Interstate Commerce Commission and subject only to safety regulations.

Directly and probably mortally affected by the conclusion reached in the majority opinion of the Court below are those individuals dealing in bulky products and conducting their own transportation operations. It is common knowledge that the expense of transportation makes up a large part of the sale price of lumber, coal and other goods of a bulky, low-value nature. It is impossible for one to charge a uniform price for such goods at all points in any appreciable area, regardless of the distance transported. One could not meet competition and operate at a profit.

The Circuit Court decision will therefore compel such individuals to discontinue hauling their goods in their own trucks and force them to handle the transportation necessities of their business through the services of carriers for hire.

The construction placed upon the Act by the Majority opinion of the court below is erroneous because the words "for compensation" used in the definitions of the classes of carriers in the Act are synonymous with "for hire." But the Circuit Court gives the phrase a much broader scope in holding that the making of a charge for transportation, commensurate with the distance of the haul, included in the sale price, amounts to transportation "for compensation." Such holding is not in accord with the intent of

Congress as expressed in the Act, nor the construction thereof by the Interstate Commerce Commission.

Such construction renders entirely useless the definition of a private carrier contained in the Act, because the same result would be reached if the definition had been wholly omitted. This is inconsistent with the fundamental canons of construction that every part of a statute or document is to be given effect, if possible.

Point II.

The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court, because it has construed the Act in such a way as to convert a private carrier into a carrier for hire, which would make the Act unconstitutional in that respect as being in violation of the Due Process Clause.

In order to clarify our position at the outset in connection with this point, it is not petitioner's primary contention that the Act is unconstitutional. On the contrary, petitioner asserts that if the definitions of carriers are properly construed and in conformity with the intent of Congress, there would be no collision between its provisions and the constitutional mandates.[4]

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4. It is presumed that Congress framed the Motor Carrier Act in the light of its lack of power to transmute a private carrier into a carrier for hire by legislative action. *Craig Contract Carrier Application*, 28 M. C. C. 629, 631; *Common, Contract and Private Carriers Defined and Distinguished by Warren H. Wagner*, I. C. C. Practititioners' Journal, Volume 9, No. 2 Page 123 (November, 1941).

But, if this assertion is incorrect and the Circuit Court has properly interpreted the classification of carriers under the terms of the statute and as intended by Congress, then petitioner urges that such classification impinges upon the property rights of petitioner and others similarly situated, in violation of the Due Process Clause of the Fifth Amendment to the Federal Constitution.

It has been held by this Court that State Legislatures are powerless to transmute an individual from the class of a private carrier into that of a public carrier for hire by a legislative fiat, in virtue of the limitations in the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

Michigan Public Utilities Commission v. *Duke* (1925), 266 U. S. 570, 69 L. ed. 445, 45 S. Ct. 191, 36 A. L. R. 1105.

Frost & Frost Trucking Company v. *Railroad Commission* (1926), 271 U. S. 583, 70 L. ed. 1101, 46 S. Ct. 605, 47 A. L. R. 457.

Smith v. *Cahoon* (1921), 283 U. S. 553, 75 L. ed. 1264, 51 S. Ct. 582.

If such legislative action by states is unconstitutional because in violation of the Fourteenth Amendment, then federal legislation with the same vice is vitiated by the Fifth Amendment.

There is little question that the rights of petitioner and others similarly situated are seriously affected by the decision below. We urge that the construction of the definitions of carriers in the Act placed thereon by the

Circuit Court does transform an operation which is in reality that of a private carrier into that of a carrier for hire, the effect of which is to force petitioner and others like it entirely out of the business which it is conducting.

Petitioner cannot conduct its lumber business as a carrier for hire, either as a common carrier as found by the trial court to be the nature of its operation, nor as a contract carrier as determined by the Circuit Court. If petitioner is a common carrier, it cannot make a profit from dealing in lumber and taking advantage of market conditions, salesmanship and the other factors of commercial enterprise, because it can only charge under the law the amount of its tariff rates on file; and furthermore, it cannot select its customers but must haul for all comers indiscriminately.

It could not operate the business for which it is chartered—that of a wholesale lumber dealer—as a contract carrier because it can only charge the amount of its minimum rate schedules filed with the Commission as required by body under the Act. If petitioner purchased lumber at the mill at a certain price, its sale price must always be the price which it paid plus the rate on file with the Commission. Then, too, petitioner could not be a contract carrier because it could not contract with itself. Furthermore, it would not be feasible, because every transaction is an individual sale and it would be impossible to comply with the requirement of having contracts on file with the Commission as required by the Act as implemented by the

Commission's regulations,[5] and if it could, its trade secrets would be given away to such an extent it could not meet competition.

CONCLUSION

The Court has construed various features of the Act, mostly on appeals from Three-Judge decisions, though on occasion by certiorari (*McDonald* v. *Thompson*, 305 U. S. 263, 83 L. ed. 164) but neither it nor any Circuit Court has heretofore had presented to it the important question here involved the construction of probably the most vital single feature of the Act, the definitions of the classes of carriers a carrier falls determines the regulations to which it is subject, which vary greatly in stringency. Important because of its widespread effect throughout the Nation. Important because it involves constitutional rights.

The petition ought to be granted.

Respectfully submitted,

JOHN B. DUDLEY,
DUKE DUVALL,

Counsel for Petitioner.

July, 1942.

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5. *Ex parte* No. MC-9, Filing of Contracts by Contract Carriers, 2 M. C. C. 55.

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 216

A. W. STICKLE & COMPANY, A CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION

The respondent, the Interstate Commerce Commission, in response to the petition for writ of certiorari, concedes the reasons advanced therefor which are shown as Reasons (1) and (3) of the petition, and upon the basis of such reasons (1) and (3) offers no objection to the granting of the petition. *Atlantic Coast Line Railroad Co.* v. *Powe, Administrator*, 283 U. S. 401, 403, 404.

However, the respondent desires to state that, while it insists that the decision (R. 174) of the

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Circuit Court of Appeals, holding petitioner to have engaged in the transportation of lumber as an interstate motor carrier subject to the provisions of Part II of the Interstate Commerce Act, is correct, it believes that it should express its view that the said Court erred in holding (R. 174) that such operations of petitioner were those of a contract carrier under section 203 (a) (15) of the Act, instead of those of a common carrier under section 203 (a) (14) of the Act, as held by the District Court (R. 94).

Respectfully submitted.

DANIEL W. KNOWLTON,
Chief Counsel.

ALLEN CRENSHAW,
FRANCIS A. SILVER,
Attorneys,
Interstate Commerce Commission.

The Solicitor General authorizes the filing of the foregoing memorandum expressing the views of the Interstate Commerce Commission, which has been prepared by counsel for the Commission.

AUGUST 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

NO. 216

In the Supreme Court of the United States

OCTOBER TERM, 1941.

A. W. STICKLE & COMPANY, a Corporation,
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VERSUS

INTERSTATE COMMERCE COMMISSION,
Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN B. DUDLEY,

DUKE DUVALL,

Counsel for Petitioner.

November, 1942.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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INTERSTATE COMMERCE COMMISSION,
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PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Supreme Court of the United States:

Though we are keenly aware of the careful consideration given by the Court to each petition for certiorari and the tremendous burden of work upon the Court, we feel justified in filing this petition for rehearing for two reasons:

First: The effect of the decisions of the Courts below will be to throw an enormous additional burden upon the carriers for hire of the Nation, which are already struggling to take care of shipments, both governmental and private, beyond their capacity.

Second: We feel that we must not have given the Court a clear picture and understanding of the controversy in our petition for certiorari and supporting brief and of the importance of its determination by this Court, in view of the fact that the Court denied certiorari notwithstanding that the Circuit Court decision was by a divided court and the Solicitor General and counsel for the Interstate Commerce Commission, the appellee, in their memorandum in response to the petition for certiorari confessed partial error of the Circuit Court and in addition agreed that Paragraphs 1 and 3 of the reasons relied on for allowance of the writ in our petition were well taken. The first of these reasons reads:

> "(1) The Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court. This is a case of first impression, being the first case involving a construction of the definitions of the three types of motor carriers classified in Part II of the Interstate Commerce Act."

The third reason reads:

> "(3) The questions presented are of great public importance because they involve the most vital feature of the Act, namely, the definitions of the classes of carriers to whom the Act applies, and the consequent regulations and provisions of the Act with which a particular individual must comply. Of special importance is the fixing of the line of demarcation between those falling into the classes of carriers for hire, with the stringent regulations justified through their character as public utilities, and those who fall into the class of private carriers, with the privilege of operating as a matter of right and subject only to slight

regulations primarily in the interest of public safety. Constitutional rights are concerned, because if the definitions contained in the Act have the effect of converting by legislative fiat the operations of one who is a private carrier into those of a carrier for hire, such would amount to the deprivation of property without due process of law."

We feel that it will be helpful to embellish the very brief statement of facts and the method of appellant's operations outlined in our petition for certiorari. In doing so, we wish to point out that the facts are undisputed, since the only evidence introduced by appellee was by stipulation (R. 59, 85).

In virtue of the facts being uncontroverted, we feel free to quote the following description of appellant's operations in the dissenting opinion of Circuit Judge Huxman, and do so because it is a succinct and clear description (R. 165), 128 Fed. (2d) 155, at 161:

"But what are the facts? Stickle was formerly in the wholesale and retail lumber business. Jackson was engaged in the retail lumber business, and also worked as a lumber salesman. They incorporated the appellant company. Its charter authorized it to buy and sell lumber at wholesale or retail or on a commission basis. It further authorized it to buy and sell at wholesale or retail other allied products, such as brick, paint, timber, and other products. Appellant solicits orders for lumber. It purchases its lumber from mills on the open market, buying wherever it gets the best prices, and paying its own money therefor. Most of the lumber is purchased to fill orders previously secured. The percentage of lumber so purchased varies from forty to eighty-five per cent of the total lumber bought, de-

pending on the condition of the market. Appellant also maintains a lumber yard in Oklahoma City where some lumber is stored and from which place deliveries are made, although at times there is no lumber stored in this yard. Appellant quoted its customers two prices, an f. o. b. price and a delivery price. The f. o. b. price included the cost of lumber to appellant, plus an added commission. The delivery price consisted of the f. o. b. price, plus the transportation charges. At first all deliveries were made by common carrier. After appellant had been doing business for about a year, it purchased trucks, and thereafter made deliveries of lumber mostly in its own trucks, although from ten to thirty per cent is still delivered by common carrier. It bought, paid for, and owned all the lumber it handled, whether sold f. o. b. or delivered. It did not haul for hire or transport property other than its own."

It must be plain that the effect of the decision of the Circuit Court that the appellant is a contract carrier (which appellee confesses is error) or the decision of the Trial Court that the appellant is a common carrier will be to compel appellant to wholly abandon its lumber business and force it into the business of a carrier for hire. This must be true, because as a common carrier appellant could charge and receive only the rates provided for in tariffs on file with the Interstate Commerce Commission under the provisions of Part II of the Interstate Commerce Act, and would not be permitted to make any profit on the spread between the purchase price of the lumber at the mill and the selling price at the point of destination, or to take chances on a rising or falling market to profit or lose.

The same thing is so if appellant is held to be a contract carrier. In the first place, it could not contract with itself and could not file written contracts with the Interstate Commerce Commission as required by law. In the second place, it would have to comply with minimum rates which must be filed with the Interstate Commerce Commission. Finally, it would be so impractical that it would be impossible to carry on the business because appellant is dealing with several hundred lumber dealers and seeking new customers each day, just like any other merchant, and the personnel of its customers changes from day to day.

The only alternative offered appellant, other than quitting the lumber business entirely and going wholly into the business of a common carrier for hire, would be to cease transporting its own lumber in its own trucks altogether, and to ship entirely by carriers for hire (it now ships from ten to thirty percent, R. 61).

We wish to be a little more explicit upon and emphasize this point because the effect on this appellant of the decisions below will be multiplied time and again upon hundreds of private carriers similarly situated.

The appellant is determined by the Circuit Court to be a contract carrier and required to cease operating its trucks in the transportation of its lumber until compliance with the provisions of the Federal Motor Carrier Act.

To do this, appellant must:

(a) File with the Interstate Commerce Commission a schedule of minimum rates (49 U. S. C. A. 318).

(b) Enter into a bilateral contract to transport lumber from a certain mill to the dealer to whom it has sold a load of lumber (49 U. S. C. A. 318, 320; *Ex parte* No. MC-12, 1 M. C. C. 628, Contracts of Contract Carriers).

(c) File with the Commission a copy of each contract (49 U. S. C. A. 320 (a); *Ex parte* No. MC-9, 2 M. C. C. 55, Filing of Contracts).

(d) Not receive any more than the price for which it purchases the lumber from the mill plus the transportation rate (49 U. S. C. A. 318 (a)).

Pursuant to the authority granted the Commission by the Act, the Commission made a report and order in *Ex parte* No. MC-12, Contracts of Contract Carriers, in April, 1937, requiring as a prerequisite to operations by contract carriers:

> "All contract carriers of property by motor vehicle, as defined in Section 203(a)(15) of the act, shall transport under contracts or agreements which shall be in writing, which shall provide for transportation for a particular shipper or shippers, which shall be bilateral and impose specific obligations upon both carrier and shipper or shippers, which shall cover a series of shipments during a stated period of time in contrast to contracts of carriage governing individual shipments, and copies of which shall be preserved by the carriers parties thereto so long as the contracts or agreements are in force and for at least one year thereafter."

In addition, these contracts must be filed with the Commission.

Of course, it is impossible to do these things and remain in the wholesale lumber business. The appellant does busi-

ness with scores of retail lumber dealers, and tries to do business with more. In other words, like any mercantile concern, it tries to sell lumber to every dealer it can in the states and territories where it does business. Of course, it could not file a contract for each shipment with the Commission.

Furthermore, since appellant is transporting its own lumber, it could not make a contract for the transportation thereof, because it could not contract with itself.

Still more significant is the fact that it could not buy the lumber from the mills at one price and sell it at a higher price to its customers. It could only charge the retail dealer what it actually paid the mill for the lumber, plus the transportation charge of the rate on file with the Commission. The statute (49 U. S. C. A. 318(a)) makes it illegal to do otherwise.

It can hardly be gainsaid that appellant would be forced out of the lumber business and could only operate as a contract carrier for hire, hauling lumber for such other people as it could get to haul. That is, it could solicit wholesale lumber dealers for their lumber to haul, or the mills if they were selling direct to retail dealers.

The situation would be just as bad under the conclusion of the trial court that appellant is a common carrier for hire, and requiring it to comply with the Act in that respect which provides for the filing of a tariff setting forth the rates to be charged (49 U. S. C. A. 317). Appellant could receive no more and no less than is provided for in such filed rates. It could not make anything from the purchase

and sale of the lumber, as it does not. Also, it would have to haul lumber for the general public whenever requested; it could not select its customers.

A consideration of these things in the light of the record demonstrates that the business as conducted by appellant is neither that of a contract carrier, as held by the Circuit Court, nor that of a common carrier, as held by the lower court.

There is no decision cited in the opinion below and no decision of the Interstate Commerce Commission that we have been able to find that holds that merely because an individual includes in the sale price of the goods which he transports a charge for transportation commensurate with the distance, makes him a carrier for hire. And, in the absence thereof, the Court should resolve every doubt against such a construction of the Act because of its serious effect upon the business of a large number of business enterprises.

It means that no dealer in a bulky product like lumber, coal and similar so-called low-value goods can transport his own goods as a private carrier. He will be forced to use carriers for hire and will be deprived of the benefit of the advantages of having his own transportation as an integral part of his business.This is because transportation represents a large portion of the value of such goods, and it is impossible to compete unless natural geographical advantages of localities are reflected in the sale price.

A simple illustration will suffice. Suppose it cost $5.00 to transport a $50.00 load of lumber to Muskogee, Oklahoma, making the sale price to the dealer there $55.00. As-

sume that Muskogee is approximately one hundred miles from the mill.

Then assume that it would cost $12.50 to transport the same load to Oklahoma City which is two and one-half times as far from the mill as Muskogee, making the sale price in Oklahoma City $62.50.

If appellant had purchased the lumber from the mill for $45.00, manifestly it could not deliver it in Oklahoma City for the same price as it delivered it in Muskogee.

The effect of the Court's holding is that for appellant to be a private carrier, it must charge the same sale price (that is, the same charge for transportation must be included therein) on the same type of lumber in every town, regardless of distance. Of course, competitive conditions make this impossible.

Furthermore, communities are entitled to the advantages of their geographical locations, as has been recognized by the Federal Courts and the Interstate Commerce Commission for many years. *Board of Trade of Kansas* v. *United States*, 36 F. S. 865 (affirmed January 5, 1942, 86 L. ed. 331).

In its final analysis, the import of the Circuit Court's decision is that if appellant sold only to lumber dealers in one town, so that the transportation charge included in the sale price was the same to all its customers, then it would be a private carrier—even though appellant's operations were otherwise conducted exactly as they are now. But, because appellant does business in widely separated towns,

it becomes a carrier for hire because it receives "compensation" for the transportation commensurate with the distance and expense thereof.

The construction of the Court of the definitions of the Motor Carrier Act deprives appellant and others similarly situated of their rights without due process of law, in that they are forced into the business of a carrier for hire or are prevented from hauling their own goods as a private carrier. They are relegated to one alternative or the other.

The fact that the Court or Congress itself desire to protect and benefit common carriers, it could not do so by this means under the constitutional mandate, as the Supreme Court of the United States squarely held in *Frost* v. *Railroad Commission*, 271 U. S. 583, 70 L. ed. 1101.

The real vice of the decision of the Circuit Court is that it sets up another standard, different from that which Congress has given us, by which to determine whether a motor carrier is a private carrier or a contract or common carrier.

The court below held that the primary test to be applied in determining whether an individual is a private carrier or not is whether the transportation is "for compensation," using this language:

> "The primary test in Sections 203(a) (14) and 203 (a)(15) is transportation 'for compensation.' "

In other words, the Circuit Court holds that if the individual receives "compensation" for the transportation of the goods which he owns, then he is conclusively not a private carrier.

This broad type of test forecloses a merchant who transports his own goods in his own equipment from including a charge in the sale price to cover the expense of transportation. Down to its ultimate possibilities of construction, this test would prevent there being any such thing as a private carrier except within urban limits.

The court below especially holds that where the owner of goods charges a different selling price at one point than it does at another, due to a different expense in transportation cost, definitely takes him out of the category of a private carrier under the statutory definition.

This is wrong. To quote from an eminent authority on transportation matters and Interstate Commerce Commission litigation:

> "It is doubted whether there is any instance where the Commission has found to be common or contract carriage any transportation in connection with which the person doing the trucking was the ultimate, actual owner of the goods, either as consignor or consignee and whose primary income was the purchase or sale of the particular goods, and not the transportation as such. Where the Commission found the transportation of goods owned by the carrier to be common or contract carriage, the Commission clearly showed that the trucker made his profit from, and was actually engaged in, the transportation business so far as the particular commodities were concerned.
>
> "As an illustration of actual ownership of the commodity transported, in *Murphy Common Carrier Application*, 21 M. C. C. 54, the Commission said:
>
> " 'Applicant, since before June 1, 1935, has been engaged in operating a coalyard, a chicken-coop factory,

and a sawmill and lumber business at Crutchfield, Ky. During this time he has sold and transported by motor vehicle a large portion of the lumber output of his mill to dealers at Cairo, Ill., and has received compensation therefor on the basis of a flat price at the mill *plus an amount for transportation based on the carload rail freight rate from Crutchfield to Cairo.* Likewise, he has sold and transported chicken coops to dealers at points in Missouri, Illinois, and Tennessee, and at other points in Kentucky, for which he has been compensated on the basis of a flat price at the factory plus an amount for handling and transportation. Frequently on return trips applicant has purchased coal at points in Illinois, which he has transported to Crutchfield and either sold and delivered to customers immediately or unloaded at his coalyard for subsequent sale and delivery. In each instance the price of the coal to the customer in Kentucky included a definite amount for the various services performed by applicant, including an amount for transportation from the mines in Illinois.

" 'From the foregoing we are impressed that applicant's principal business is that of a dealer in lumber, chicken coops, and coal, and that the above-described motor-vehicle operations are merely incidental thereto and are not engaged in as separate and distinct undertakings. *The fact that a charge is added to the selling price of the products is not controlling and does not alter the essential nature of the operations.* We conclude that applicant, in respect of them, is a private carrier and that he does not require authority from us in order to continue them. Compare *Swanson Contract Carrier Application*, 12 M. C. C. 516.' " (Italics ours). Warren H. Wagner, Editor-in-Chief, I. C. C. Practitioners' Journal, in November, 1941 Issue, Vol. 9, No. 2.

It was stipulated that appellant was the owner of all the lumber it transported (R. 62). There was no subterfuge involved.

The decision of the Circuit Court is not in harmony with its own opinion in *Interstate Commerce Commission* v. *Clayton*, 127 Fed. (2d) 967, which is very similar to the instant case and involves a determination of the proper classification of a carrier under the Federal Motor Carrier Act.

Clayton transported coal to which he held the title, from the mine to the town of Ucon, Utah, where he lived, and several neighboring towns. As the Court found in the opinion, he solicited orders for coal, both before he transported it and afterward, though he did not purchase coal to fill any particular order.

Appellant here operates both ways, and makes sales of lumber before it purchases the same from the mill and also purchases lumber for which it has no prior sale. The amount varies widely as to whether the lumber market is steady or advancing or declining. This is stipulated to and undisputed (R. 62).

The Court pointed out in the Clayton case that Clayton charged a uniform price in the several towns, and:

> "He makes no differentiation in price between coal delivered at Ucon and at the other nearby towns, although delivery to the other towns entails a longer haul."

An examination of that case reveals that the towns are in the vicinity of five or six miles or just a short distance of each other.

The appellant here is serving towns hundreds of miles apart. Would Clayton not be a private carrier if he charged a higher price in some town that required one hundred miles more transportation?

The Circuit Court in the Clayton case said with reference to the sale price of the coal by Clayton:

> "The price of $8.50 is determined by competitive conditions. The coal costs him $3 per ton and the cost of transportation, including depreciation, gas, oil, tires, and repairs is approximately $2.55 per ton.
>
> * * * * * * * *
>
> "The cost of the coal and transportation is $5.57 per ton. He sells it for $8.50 per ton. Thus, he *realizes a profit, both from the transportation and from the sale* of the coal, the margin of profit being enough to cover both." (Italics ours).

The appellant here is in stronger position because it is realizing no profit from the transportation, as the undisputed evidence shows. The profit was solely from the difference between the price paid for the lumber and the price for which it was sold.

A further comparison is helpful. The Court in the Clayton case said:

> "He does not hold himself out to the general public to haul coal for compensation."

There is nothing in the record to show that appellant here holds itself out to the general public to haul lumber for compensation. As a matter of fact, the Circuit Court evidently so felt because it summarily rejected the Trial Court's holding that it was a common carrier.

The Circuit Court also takes notice in the Clayton case that the price for which Clayton sold was "determined by competitive conditions." This is likewise true of the sale price of appellant of its lumber, as shown by the undisputed proof (R. 110-4).

There are six decisions of the Interstate Commerce Commission in the Clayton opinion in support of the conclusion that Clayton was a private carrier, namely:

D. L. Wartena, Inc., Common Carrier Application, 4 M. C. C. 23.

Gallup Mercantile Company Common Carrier Application, 14 M. C. C. 23.

Murphy Transfer Company Common Carrier Application, 9 M. C. C. 361.

Murphy Common Carrier Application, 21 M. C. C. 54.

Swanson Contract Carrier Application, 12 M. C. C. 516.

Spanhake Common Carrier Application, 21 M. C. C. 258.

We assert that each of these decisions is just as applicable and persuasive in favor of the classification of the operations of appellant herein as that of a private carrier as those of Clayton. In all of them, a transportation charge was made in the sale price, and the Commission expressly held that the individual was a private carrier, "notwithstanding the fact that its selling price includes freight charges."

A balancing and contrast of the operations of Clayton and appellant shows that there is no real and substantial difference between the two upon the fundamentals under consideration; that both purchase their product as cheaply

as possible—one coal and the other lumber—and sell it for as high a price as competitive conditions will permit, the sale price, of course, including the charge for transportation.

CONCLUSION

This is a case of first impression and a test case. The effect of the decision of the Circuit Court of Appeals upon the transportation of the Nation almost transcends conception, even by those who are experts in the transportation industry. The test that the word "compensation," as used in the Motor Carrier Act definitions, is equivalent to "for hire," as contended for by the appellee and as held by the Circuit Court of Appeals, has not been put into total and general force by the Interstate Commerce Commission in measuring the character and nature of the operations of the carriers of this country, and we assume that the reason therefor is that an expression from this Court has been awaited.

If this criterion is put into general action throughout the United States, it will mean that a large amount of gasoline, petroleum, petroleum products, coal, lumber and even various numbers of manufactured products that are hauled by the merchants who own them, in their own trucks, will be dumped upon the over-loaded public carriers, and will seriously affect the national economy. It will mean a widespread destruction of the property right of a person to haul his own goods without being subjected to the onerous requirements upon a carrier for hire.

We respectfully pray the Court to reconsider our petition for certiorari herein, and to assume jurisdiction of this cause and decide the same upon the merits.

Respectfully submitted,

JOHN B. DUDLEY,
DUKE DUVALL,
Counsel for Petitioner.

November, 1942.

CERTIFICATE.

I do hereby certify that the foregoing petition for rehearing is not filed for delay, but is filed in good faith, in the belief that it is meritorious.

DUKE DUVALL,
Attorney for Petitioner.